Office-Supreme Court, U.S.
FILED
OCT 20 1984
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-456

In The

Supreme Court of the United States

October Term, 1984

—o—

WILLIAM J. SCOTT and HERBERT CAPLAN

Petitioners,

vs.

WILLIAM J. BENSON,

Respondent.

—o—

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

—o—

ANDREW B. SPIEGEL
Attorney for Respondent
77 West Washington Street
Suite 707
Chicago, Illinois 60602
(312) 782-8999

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

BEST AVAILABLE COPY

7pp

QUESTION PRESENTED

Whether the right of employees to be free from retaliation for their exercise of First Amendment rights was clearly established in 1976, thereby negating Defendants' qualified immunity claim on a summary judgment motion.

TABLE OF CONTENTS

Pages

STATEMENT 1

ARGUMENT 2

CONCLUSION 4

TABLE OF AUTHORITIES

Cases:

Davis v. Scherer, 104 S.Ct. 3012 (1984) 3

Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) 3

Hostrop v. Board of Junior College District No. 515, 471 F.2d 488, 491-93 (7th Circuit), cert. denied, 411 U.S. 967 (1973) 3

Pickering v. Board of Education, 391 U.S. 563 (1968) 2, 3

Constitution, Statutes and Regulations:

42 United States Code § 1983 1

First Amendment 2, 3

Fourteenth Amendment 2

No. 84-456

In The

Supreme Court of the United States

October Term, 1984

WILLIAM J. SCOTT and HERBERT CAPLAN

Petitioners,

vs.

WILLIAM J. BENSON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STATEMENT

Respondent WILLIAM J. BENSON (Benson) initiated this action under 42 U.S.C. § 1983 on November 24, 1981, alleging that WILLIAM J. SCOTT (Scott), former Illinois Attorney General, and HERBERT CAPLAN (Caplan), former Illinois First Assistant Attorney Gen-

eral, violated Benson's rights under the First and Fourteenth Amendments. The district court entered summary judgment for the Defendants, finding that they were entitled to qualified immunity from liability for their actions on both claims.

The Seventh Circuit affirmed the district court's finding of immunity with respect to Benson's due process claim but reversed the district court on the First Amendment claim. It is Benson's First Amendment retaliation claim which is now before this Court.

Benson adopts, as his Statement of the case, the statement contained in the opinion of the Seventh Circuit, which appears at A-2 through A-5 of the Scott/Caplan petition.

It should be noted, however, that Benson's disseminations to the news media and law enforcement agencies of information and evidence concerning improprieties in the state court proceedings included, *inter alia,* the allegation that an Illinois Assistant Attorney General had personally ordered the alteration and destruction of Illinois Department of Revenue records and the subornation of false testimony.

ARGUMENT

The issue in this case does not warrant review on certiorari. The right of employees to be free from retaliation for their exercise of First Amendment rights has been clear at least since *Pickering v. Board of Education,* 391 U.S. 563 (1968). The First Amendment vio-

lation which Benson asserts occurred in 1976 and continued through 1981.

In *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982) this Court held that whether an official may prevail in his or her qualified immunity defense depends upon the "objective reasonableness" of his or her conduct as measured by reference to clearly established law. In *Davis v. Scherer,* 104 S.Ct. 3012 (1984) this Court again emphasized that "no other circumstances are relevant to the issue of qualified immunity *Id.,* at 3016.

In reversing the district court, the Seventh Circuit correctly found that:

> In determining whether the actions alleged by Benson violate clearly established law, however, the relevant legal framework is not the Illinois Indemnification Act, as the Defendants and the district court believed. Benson's claim is that the Attorney General violated his rights under the First Amendment. This claim does not require Benson to show that he had a right to reimbursement under the Act, for even where there is no right to a valuable government benefit, the denial of that benefit may not be premised on an employee's exercise of his First Amendment rights. (citations omitted). A-8

The only relevant consideration on Benson's First Amendment claim is whether it was objectively reasonable for the Defendants to retaliate against Benson for his exercise of First Amendment rights. Petitioners concede that they cannot do so at page 11 of their petition; that is the end of the case.

It was not objectively reasonable in 1976 to retaliate against an employee for exercising his or her First Amendment rights. *Pickering,* supra; *Hostrop v. Board*

of Junior College District, No. 515, 471 F.2d 488, 491-93 (7th Circuit), cert. denied, 411 U.S. 967 (1973).

The decision of the Seventh Circuit is in full accord with the principles expressed in decisions of this Court and those decisions of the Court of Appeals which have had occasion to address this subject matter.

The foregoing reasons should be compelling to suggest to this Court to deny certiorari.

CONCLUSION

For the foreoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

ANDREW B. SPIEGEL
Attorney for Respondent
77 West Washington Street
Suite 707
Chicago, Illinois 60602
(312) 782-8999